No. 16309

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED STEIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR REHEARING.

WM H. NEBLETT,
649 South Olive Street,
Los Angeles 14, California,

E. W. MILLER,
1127 Wilshire Boulevard,
Los Angeles 17, California,
Counsel for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

I.

Status of the case 1

II.

Grounds for a rehearing 2

III.

There was a conflict of interest between Mr. Sweeney, the attorney who defended the appellant at the trial, and appellant, within the meaning of Glasser v. United States, supra; Audett v. United States, supra, and Reynolds v. United States, supra 4

IV.

The general rule that an order denying a motion for a continuance will not be reversed unless an abuse of discretion of the trial court can be shown has no application to the main point in this case arising under the Sixth Amendment to the Federal Constitution 7

V.

Appellant did not, as the opinion erroneously states at page 7, claim that Mr. Sweeney was not a competent lawyer or that he lacked in education and training. What appellant did claim was that Mr. Sweeney was overpowered by his own troubles in the State court where he was charged with being a narcotics peddler and bribery in connection with being a narcotics peddler, which charges made him so fearful of his own safety that he could not properly protect Stein 9

VI.

Appellant suggests in accord with Rule 23 of this court, that a rehearing should be granted and that the case should be reheard en banc 14

TABLE OF AUTHORITIES CITED

Cases	PAGE
Audett v. United States, 265 F. 2d 837	3, 6, 14
Coplon v. United States, 191 F. 2d 749	6
Glasser v. United States, 315 U. S. 60, 62 S. Ct. 457	3, 4, 6, 11, 12, 14, 16
Jenks v. United States, 353 U. S. 657, 77 S. Ct. 1007	3, 10
Reynolds v. United States, 267 F. 2d 235	3, 6, 7, 14

Statutes	
Health and Safety Code, Sec. 11500	3, 5
Penal Code, Sec. 67	3, 5
Penal Code, Sec. 67½	3, 5
United States Code, Title 18, Sec. 88	11
United States Code, Title 18, Sec. 371	1
United States Code, Title 18, Sec. 3500(b)	3, 9
Untied States Code, Title 21, Sec. 174	2
United States Code, Title 26, Sec. 7237(d)	2
United States Constitution, Sixth Amendment	2, 8, 14

No. 16309

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED STEIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR REHEARING.

To the Honorable, the United States Court of Appeals for the Ninth Circuit, and to the Honorable Albert Lee Stephens, to the Honorable John D. Martin, Sr., and to the Honorable William E. Orr, Judges of said Court:

I

Status of the Case.

Appellant Fred Stein petitions this Honorable Court for a rehearing of its decision rendered November 16, 1959, affirming a judgment convicting appellant on five counts of an indictment charging him in one count with a conspiracy between appellant and three "unindicted conspirators", Quentin Browning, Clarence Winfrey and Celeste Winfrey, in violation of 18 U. S. C., Section 371, to receive, sell and transport heroin and to facilitate the

receipt, sale and transportation of the drug; the remaining four counts of the indictment on which appellant was convicted charged him with the substantive offenses of sale, and the facilitation of the sale of certain quantities of heroin to the above named three "unindicted conspirators", in violation of 21 U. S. C., Section 174. The consecutive sentences given appellant add up to 50 years. Appellant is 54. The sentence is for life with no hope of parole. (26 U. S. C., Sec. 7237(d).)

II

Grounds for a Rehearing.

1. As stated at the inception of the opinion, the principal question for determination in this case is whether or not appellant Stein had the *effective assistance* of counsel guaranteed to him by the *Sixth Amendment* to the *United States Constitution,* which follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the Assistance of Counsel for his defense.*" (Emphasis added.)

2. The ordinary rule that a continuance of a trial is within the sound discretion of the trial court and will not be disturbed on appeal unless an abuse of that discretion can be shown, has no application to this case where the motion for continuance was made by counsel, Mr. Sweeney, on the ground of his confessed mental and physi-

cal inability to give appellant an adequate defense while he was laboring under a charge in the state court of being a narcotic peddler. Thus, this Court's holding at pages 2 and 3 of the opinion that, "We find no abuse of discretion by the court in refusing the fourth application for a continuance", has no application to the case under the decision of *Glasser v. United States* (1942), 315 U. S. 60, 62 S. Ct. 457, and under the recent decisions of this court of *Audett v. United States* (C. A. 9, May 4, 1959), 265 F. 2d 837, and *Reynolds v. United States* (C. A. 9, June 1, 1959), 267 F. 2d 235.

3. The opinion (footnotes 1 and 2, Op. pp. 2-5) shows on its face that there was a conflict of interest between attorney Sweeney and appellant and that Mr. Sweeney did not press important points in the defense of appellant for fear that by urging those important points he might damage his own defense to charges pending against Mr. Sweeney in the state court of peddling narcotics and bribery of the arresting state officers. (Health & Safety Code of Cal., Sec. 11500; Penal Code of Cal., Secs. 67 and 67½.)

4. The opinion, page 7, shows on its face that Mr. Sweeney was remiss in his duty at the trial in not making a full disclosure to the trial court of his troubles in the state court and in that he did not require the Government to produce reports of the government witnesses as provided by 18 U. S. C., Section 3500(b) and *Jenks v. United States* (1957), 353 U. S. 657, 77 S. Ct. 1007. Undoubtedly, if the trial court had required Mr. Sweeney to make a full disclosure of the circumstances surrounding the narcotic and bribery charges pending against him in the state court, the trial court would have granted the continuance in order for Stein to procure other counsel or

require Mr. Weiss, his only counsel of record at the time, to come in and try the case. A full disclosure would have shown that Mr. Sweeney could not try the case properly without antagonizing the officers who would probably be witnesses against him in the state court.

III.

There Was a Conflict of Interest Between Mr. Sweeney, the Attorney Who Defended the Appellant at the Trial, and Appellant, Within the Meaning of Glasser v. United States, Supra; Audett v. United States, Supra, and Reynolds v. United States, Supra.

It was Mr. Sweeney who moved for a continuance of the trial on the ground that he was not mentally and physically able to defend appellant adequately because of his mental and physical disability resulting from the publicity Mr. Sweeney had received in connection with his arrest on a narcotic and bribery charges by the state authorities. [Op. p. 2.] Right there, the conflict of interest appeared. (*Glasser v. United States,* 315 U. S. 60, 62 S. Ct. 457.)

This Court then proceeds to review Mr. Sweeney's mental and physical condition at the commencement of the trial in the light of subsequent events. [Op. p. 3.] After the trial court had denied attorney Sweeney's motion for a continuance and had begun to empanel the jury, it was brought to the court's attention that Mr. Weiss was the attorney of record for appellant. [Op. p. 3.] This Court [Op. pp. 4-5] then passes to the question of coercion, which it holds cannot be sustained because this Court is impressed with the fairness of the lower court in offering to have Mr. Weiss produced in court. This Court has here incorrectly stated the record. The

facts as shown by the record are that attorney Harry Weiss was the only attorney of record for appellant when the case was called for trial. Mr. Weiss was so designated by appellant in a praecipae signed by Mr. Weiss April 7, 1958. [Transcript p. 15.] Mr. Weiss never retired as attorney for appellant. He was never relieved by the court. Why he did not appear at the trial is best known to Mr. Weiss. Besides, it was shown that attorney Sherman, who appeared in the case on one or two occasions, and Sweeney, who tried the case, were actually attorneys engaged by Mr. Weiss to assist him in the case. [Footnotes 1 & 2, Op. pp. 2-6.]

The lower court did not offer to have Mr. Weiss produced in court when Mr. Sweeney announced that he was physically and mentally unable to go on with the trial of this narcotic case because of the publicity following his arrest and charges in the state court of being a narcotic peddler and bribe dispenser and because of his fear that the defense of appellant might prejudice him, Mr. Sweeney, in the defense of his own case in the state court.

In the circumstances of this case, we believe that we should invite this Court's attention to the fact that Mr. Sweeney has since been tried in the state court on charges of the sale and transportation of a narcotic, heroin, a violation of 11500 of the Health & Safety Code of California, and on a bribery charge in connection with the heroin sale, in violation of Sections 67 and 67½ of the Penal Code of California. He was convicted on all charges. Mr. Sweeney has appealed to the District Court of Appeal of California, Second Appellate District. The title of that pending appeal is *People of the State of California, plaintiff and respondent, v. Paul W. Sweeney, defendant and appellant,* 2nd Criminal No. 6824. Mr. Sweeney represents himself on his appeal.

This Court recognizes [Op. p. 6] the well established principle announced in *Glasser v United States, supra,* that if a conflict of interest was made to appear between Mr. Sweeney and the appellant, the conviction would be reversed without the court making a search of the record to determine whether or not Mr. Sweeney's representation of the appellant was adequate. It was said in *Coplon v. United States,* (U. S. C. A. D. C., 1951), 191 F. 2d 749, 760, that:

> "A defendant in a criminal case may not legally be found guilty except in a trial in which his constitutional rights are scrupulously observed. *No conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel,* or any other element of due process of law without which he cannot be deprived of life or liberty." (Emphasis added.)

The principle has been recognized by this Court in the only cases we can find construing the subject, the most important recent ones being *Audett v. United States,* (C. A. 9, 1959), 265 F. 2d 837, and *Reynolds v. United States* (C. A. 9, 1959), 267 F. 2d 235.

In the *Audett* case, it was said at page 839 of the opinion:

> "It has become axiomatic that, in the absence of intelligent waiver, the right to the assistance of cousel in criminal cases
>
> 'is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty.'
>
> And prejudice will be inferred from the denial of assistance of counsel."

In the *Reynolds* case, it was said at page 236 of the opinion:

> "In our view the district court erred, in the circumstances of this case, by denying the appellant the right to conduct his own defense. As this Court, speaking through Judge James Alger Fee, stated in *Duke v. United States*, 9 Cir., 255 F. 2d 721, at page 724, certiorari denied 357 U. S. 920, 78 S. Ct. 1361, 2 L. Ed. 2d 1365:
>
> *'There are two principles which are founded on reason and authority in this field to which this Court gives full weight. First, an accused has an unquestioned right to defend himself.* [Citing Title 28, U. S. C. A. Section 1654] *Second, an accused should never have counsel not of his choice forced upon him.* [Citing *Adams v. United States ex rel. McCann*, 317 U. S. 269, 279, 63 S. Ct. 236, 87 L. Ed. 268] *This Court has never failed to recognize either of these fundamental rights.'*" (Emphasis added.)

IV.

The General Rule That an Order Denying a Motion for a Continuance Will Not Be Reversed Unless an Abuse of Discretion of the Trial Court Can Be Shown Has No Application to the Main Point in This Case Arising Under the Sixth Amendment to the Federal Constitution.

This Court based its decision affirming the judgment upon the following statement appearing on pages 2 and 3 of the Opinion:

> "The ground most strenuously urged was the assertion by Mr. Sweeney that he was not mentally and physically able to adequately defend the appellant. In this connection, we quote the court proceed-

ings in note 1.[1] The alleged mental and physical disability was asserted to be the result of publicity Mr. Sweeney had received in connection with his arrest on a narcotics charge. *We find no abuse of discretion by the Court in refusing the fourth application for a continuance.*" (Emphasis added.)

We believe that the quotation at the beginning of footnote 1, page 2 of the Opinion shows as a matter of law that Mr. Sweeney by his own declaration could not give appellant the effective defense required by the Sixth Amendment. The colloquy referred to between Mr. Sweeney and the Court and quoted in foot note 1 is as follows:

1. "Mr. Sweeney: * * * Thirdly, there is a question of the recent publicity which I have received in this affair over on *the state side by my arrest on this—what was it, bribery, incident—that was widely covered by radio, televison and the newspapers,* having been carried on the front page of the newspapers and being discussed over television as well as over the radio.

"Mr. Stein came to me and asked me, did I feel in light of all that had recently happened, was I in the proper mental attitude to represent him, and I informed him that I was not.

"I felt that because of the nature of this kind of charge and the publicity that this case might get, it might materially affect any defense that I might have as to my action if I were to be connected in any way to any sort of situation like that.

"The Court: That occurred several weeks ago?

"Mr. Sweeney: It occurred two weeks ago.

"The Court: It occurred long enough ago that some change in counsel should have been made by this time." (Emphasis added.)

It was patently an abuse of the Court's discretion to deny a reasonable continuance in those circumstances.

V.

Appellant Did Not, as the Opinion Erroneously States at Page 7, Claim That Mr. Sweeney Was Not a Competent Lawyer or That He Lacked in Education and Training. What Appellant Did Claim Was That Mr. Sweeney Was Overpowered by His Own Troubles in the State Court Where He Was Charged With Being a Narcotics Peddler and Bribery in Connection With Being a Narcotics Peddler, Which Charges Made Him So Fearful of His Own Safety That He Could Not Properly Protect Stein.

The opinion states at page 7 that:

"Appellant attempts to point out certain instances in which Mr. Sweeney was remiss in his duty. *Appellant says Sweeney must have been ignorant of Section* 3500(b) of Title 18 U. S. C., or the case of *Jenks v. U. S.*, 353 U. S. 657 (1957), because he did not demand the production of government witnesses' pretrial statements. If he was ignorant of the right to make such a demand, it could not be because of his alleged frame of mind because of a pending indictment. It would have been due to a gap in his general education, which is not urged."

The foregoing statement from the Opinion is the opposite of what appellant contended. Appellant has not contended that Mr. Sweeney was ignorant of Section 3500(b)

or of the *Jenks* case. What appellant did contend on this subject is shown by the following excerpts from pages 47-48 of Appellants Brief:

> "The production of the statements and reports of those witnesses, made prior to the trial, was the only sure way to develop, on cross examination of the government's witnesses, the manipulations of the officers and the promises of the officers to Browning and to the two Winfreys of immunity from prosecution and all other important things to the defense in their testimony. The statements and reports would have been of the greatest value in the defense of the appellant, as he was convicted solely upon the testimony of the accomplices. *Nothing could have occurred, which could have demonstrated more clearly Sweeney's incompetence, than the failure to demand the statements. It cannot be supposed that Sweeney was ignorant of Section* 3500 *or the case of Jenks v. United States* (1957) 353 U. S. 657, 77 S. Ct. 1007. Section 3500 is known by its popular name as the Jenks law. The section became effective in September, 1957, and was based on the *Jenks* decision. Due to the wise publicity following the *Jenks* decision and the adoption of Section 3500, a lawyer practicing criminal law, as Sweeney was, who did not know about the section and its several intendments would, in itself, be enough to demonstrate his incompetence to try a criminal case in the Federal Courts. There is no answer to Sweeney's failure to take advantage of this vital element in the defense of appellant *other than the fact that the record indicates that he, himself, was involved in the narcotics racket and that he did not dare to ask for the reports, as the manipulations prior to the trial, in which he confessed*

he had indulged, would probably have exposed him as a member of the racket.

Under *Jenks v. United States, supra,* if Mr. Sweeney had demanded the reports and they had been refused, there was nothing the Government could have done but dismiss the indictment."

It is obvious from reading the proceedings quoted in footnotes 1 and 2, pages 2-5 of the Opinion, that the requirement of the Sixth Amendment was not met by the vaccilation of Mr. Sweeney and Mr. Weiss in this case. Obviously Mr. Sweeney was trying to protect himself first, and Mr. Weiss second, with the appellant left in the unfortunate position of not knowing what to do or say. The Sixth Amendment was plainly violated when the court denied appellant's motion for a continuance to obtain other counsel in place of Mr. Weiss and Mr. Sweeney, and when the court in effect directed Mr. Sweeney over his objection to go ahead with the trial.

We believe that the decision is in direct conflict with the case of *Glasser, Kretske, Kaplan and Roth v. United States* (1942), 315 U. S. 60, 62 S. Ct. 457, which seems to be directly in point here. In that case, Glasser, Kretske, Kaplan and Roth were indicted. The four persons mentioned were found guilty upon an indictment charging them with conspiracy to defraud the United States. (18 U. S. C., Sec. 88.) The Court of Appeals affirmed the convictions. (116 F. 2d 690.) Glasser, Kretske and Roth petitioned the Supreme Court for certiorari, which was granted. Glasser and Kretske had been assistant United States Attorneys until a short time before the indictment was returned.

William Stewart was employed by Glasser to represent him and entered his appearance as Glasser's attorney. The

firm of Harrington and McDonald entered their appearance for Kretske. At the commencement of the trial, McDonald informed the Court that Kretske did not wish to be represented by him. The Court then asked Stewart if he could act as Kretske's attorney. Defendant Glasser, who was represented by Stewart, said he would like to have his own attorney represent him, alone. After a colloquy between counsel and the Court, the Court entered an order vacating the appointment of McDonald as attorney for Kretske, and appointed Stewart to represent him. Glasser remained silent. Stewart thereafter represented Glasser and Kretske throughout the trial. At the conclusion of the trial, all of the defendants were convicted, and the Seventh Circuit affirmed. (116 F. 2d 690.) The Supreme Court granted certiorari.

Numerous grounds were urged in the Supreme Court for reversal. The Supreme Court affirmed the conviction of Kretske and Roth but reversed Glasser's conviction. Glasser's conviction was reversed solely upon the ground of the appointment by the Court of his counsel, Stewart, to represent Kretske. It is impossible to distinguish the *Glasser* case from the case involved. In the case involved, Sweeney did not want to be forced to trial as appellant's attorney because he feared it would hinder the defense of himself in the similar charge which he was then facing in the State Court. The Supreme Court reversed the *Glasser* case because there was some conflict in the defense by Stewart of both Glasser and Kretske. On the face of things, it is clear that Sweeney was faced with a much more serious problem as he, himself, was involved personally. It is too much to expect of human nature that an attorney would do his best in a criminal case to defend his client, where a vigorous defense of the client would have the effect of embarrassing the at-

torney in the defense of himself on a similar charge. Reversing the conviction of Glasser. The Supreme Court said:

> *"To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.* Cf. Snyder v. Massachusetts, 291 U. S. 97, 116, 54 S. Ct. 330, 336, 78 L. Ed. 674, 90 A. L. R. 575; Tumey v. Ohio, 273 U. S. 510, 535, 47 S. Ct. 437, 445, 71 L. Ed. 749, 50 A. L. R. 1243; Patton v. United States, 281 U. S. 276, 292, 50 S. Ct. 253, 256, 74 L. Ed. 854, 70 A. L. R. 263. And see McCandless v. United States, 298 U. S. 342, 347, 56 S. Ct. 764, 766, 80 L. Ed. 1205. Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from *embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court.* In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, it is especially important that he be given the benefit of the undivided assistance of his counsel without the court's becoming a party to encumbering that assistance. Here the court was advised of the possibility that conflicting interests might arise which would diminish Stewart's

usefulness to Glasser. Nevertheless Stewart was appointed as Kretske's counsel. Our examination of the record leads to the conclusion that Stewart's representation of Glasser was not as effective as it might have been if the appointment had not been made. *We hold that the court thereby denied Glasser his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment.* This error requires that the verdict be set aside and a new trial ordered as to Glasser." (315 U. S. pp. 75, 76; 62 S. Ct. pp. 467-468.) (Emphasis added.)

VI.

Appellant Suggests in Accord With Rule 23 of This Court, That a Rehearing Should Be Granted and That the Case Should Be Reheard En Banc.

The suggestion is made because of the novelty of the main question presented, that of an attorney being unable to give a defendant effective assistance in a criminal case in a federal court because the attorney himself was laboring under similar charges in a state court, namely, the sale, transportation and possession of a narcotic. The rule is well established by *Glasser v. United States, supra,* that any conflict of interest between two or more defendants whom an attorney represents in a criminal case will destroy the effective assistance of counsel required by the *Sixth Amendment.* The principle of the *Glasser* decision has been recognized by other panels of this court in the recent cases of *Audett v. United States* (C. A. 9, May 4, 1959), 265 F. 2d 837, 839, and *Reynolds v. United States* (C. A. 9, June 1, 1959), 267 F. 2d 235, 236. So far as counsel for appellant have been able to determine this is a case of first impression where the conflict of interests arises out of an attorney's indictment

in the state court on charges similar to those on which he is defending a client in a federal court.

Counsel for appellant earnestly contend that no attorney should be allowed to defend in a federal court a person who is charged with a narcotics offense under the federal laws when the attorney himself is at the same moment laboring under a narcotic indictment in a state court.

After defendant's motion for a continuance had been denied, Mr. Sweeney announced to the court as shown in Footnote 1 page 2 of the Opinion that:

> "Mr. Sweeney: I would like the record to indicate that I am totally both mentally and physically unable to go to trial."

This court then goes on to say on page 3 of the Opinion that:

> "As to the question of whether Mr. Sweeney was in fact in a mental and physical condition to represent appellant, we as a reviewing court are privileged to view the question in the light of events subsequent to the ruling, which will be more fully developed later."

The extensive quotation from the proceedings in Footnote 2, pages 3, 4 and 5 of the Opinion, does not touch upon the question of conflict of interest. All of the proceedings quoted in Footnote 2 relate solely to who, at the time, was actually the attorney for appellant. We have already shown above that Mr. Weiss was the attorney for appellant designated as such by precipe. The court in effect compelled appellant to sign the precipe designating Mr. Sweeney as his counsel for the trial. It is so shown by the colloquy found in Footnote 2, pages 3 and 4 of the

Opinion, which took place between the court and appellant and is as follows:

"The Court: I have here an appearance designation of counsel. Now do you refuse to sign it?

"The Defendant: (Pause)

"The Court: Do you refuse to sign designating Mr. Sweeney as your lawyer?

"The Defendant: Yes.

"The Court: You do or do not?

"The Defendant: I will sign it."

What else could this hard pressed defendant do than sign the precipe when it was presented to him by the court in the circumstances shown by the above quotation? We contend that this quotation brings this case squarely within the ruling in *Glasser v. United States, supra.* This court says at page 6 of the Opinion:

"We are left with the conviction that the sole purpose of injecting the alleged inability of Mr. Sweeney to conduct the trial was to secure a continuance."

It should be borne in mind that Mr. Sweeney was the one who injected his inability arising out of the conflict between his own defense in the state court and that of the appellant in the federal court. The appellant said nothing except when he was questioned directly by the court. Under the *Glasser* case it does not matter what the purpose of Sweeney may have been. The mere statement by him to the court of the fact that he was unable to go ahead with the defense of Stein because it would probably injure him in his defense of the charges against him in the state court was enough to establish the conflict without more.

Appellant respectfully contends that his petition for rehearing should be granted and that the case should be reheard in *banc*.

Respectfully submitted,

WM. H. NEBLETT,

E. W. MILLER,

Counsel for Appellant.

Certificate of Counsel.

Wm. H. Neblett, one of counsel for appellant, certifies that in his judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

WM. H. NEBLETT.